UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UPMC AND ITS SUBSIDIARY, UPMC PRESBYTERIAN SHADYSIDE, SINGLE EMPLOYER, d/b/a UPMC PRESBYTERIAN HOSPITAL AND d/b/a UPMC SHADYSIDE HOSPITAL	Cases:	06-CA-102465 06-CA-102494 06-CA-102516 06-CA-102518 06-CA-102525 06-CA-102534 06-CA-102540 06-CA-102542 06-CA-102544 06-CA-102555 06-CA-102559 06-CA-102566 06-CA-104090 06-CA-104104 06-CA-106636 06-CA-107127 06-CA-107431 06-CA-107532 06-CA-107896 06-CA-108547 06-CA-111578 06-CA-115826
and		
SEIU HEALTHCARE PENNSYLVANIA, CTW, CLC		

UPMC'S ANSWERING BRIEF IN OPPOSITION TO COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION

Respondent UPMC submits this Answering Brief in Opposition to Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Supplemental Decision. In the Supplemental Decision, Administrative Law Judge Mark Carissimi dismissed single employer allegations from the Complaint underlying this matter, concluding that "it would not effectuate the policies of the Act to continue to litigate the complaint allegation that UPMC and Presbyterian Shadyside constitute a single employer." (7/31/2015 Supp. D., at 8:32-35.)

The ALJ's well-reasoned Supplemental Decision is fully supported by the record and relevant authority. As such, the General Counsel's Exceptions are without merit and its request for reversal of the ALJ's Supplemental Decision should be rejected. Certain aspects of the General Counsel's Exceptions and arguments advanced in support of those Exceptions are discussed in more detail below. UPMC does not concede or agree to the validity or applicability of any of the statements or arguments made by Counsel for the General Counsel in its Exceptions or Brief in Support, including those which are not specifically addressed or referred to in this Answering Brief.

FACTUAL BACKGROUND

The ALJ's recitation of the factual background central to the Supplemental Decision is supported by the record and should be adopted by the Board.

In its Brief, the General Counsel distorts and exaggerates various aspects of the background of this matter. Notably, and left unaddressed in the General Counsel's Brief, is the fact that this case arises out of a longstanding corporate campaign waged by SEIU Healthcare Pennsylvania CTW, CLC (the "SEIU") targeting UPMC, a holding company, and various of its subsidiaries, including UPMC Presbyterian Shadyside ("Presbyterian Shadyside"). No petition for an election has been filed despite the passage of years. Furthermore, there have been no specific allegations of unlawful conduct on the part of UPMC, or remedies sought from UPMC. While their campaign has been stagnating, the SEIU has pursued numerous Board charges, some of which have led to the issuance of complaints. The history of those complaints, and in particular the inclusion of single employer allegations in the complaints, provides relevant background to the ALJ's Supplemental Decision.

The SEIU's first salvo of unfair labor practice charges culminated in a December 2012 Consolidated Complaint ("UPMC I") naming as respondents UPMC, Presbyterian Shadyside, and Magee – Womens Hospital of UPMC. Included in UPMC I were allegations that the three Respondents were a single employer for purposes of federal labor law. (*See* UPMC Br. in Support of Mot. to Dismiss Ex. A, UPMC I Am. Consolidated Compl.) Ultimately, the parties executed a stipulation obviating the need to litigate the single employer issue. (*See* UPMC Br. in Support of Mot. to Dismiss Ex. B, Stipulation.) In the stipulation, UPMC agreed to ensure certain remedial actions were taken.

The SEIU's second wave of unfair labor practice charges culminated in the Consolidated Complaint underlying this matter, naming as Respondents solely UPMC and Presbyterian Shadyside ("UPMC II"). (*See* UPMC Br. in Support of Mot. to Dismiss Ex. C, UPMC II Am. Consolidated Compl.) Critically, and conveniently ignored by the General Counsel, the UPMC II Consolidated Complaint contained no allegations of unfair labor practices purportedly committed by UPMC. (*Id.*) Further, the UPMC Consolidated Complaint requested no specific relief gainst UPMC. (*Id.*) Rather, the sole allegation in the UPMC II Consolidated Complaint regarding UPMC was that UPMC and Presbyterian Shadyside are purportedly a single employer.

A hearing was held on the allegations of the UPMC II Consolidated Complaint beginning on February 10, 2014. At the hearing, the Administrative Law Judge exercised his authority to sever the single employer allegations from the merits allegations of the UPMC II Consolidated Complaint. (Supp. D. 2:7-8.) For 19 trial days, the General Counsel and the SEIU prosecuted all merits allegations of the UPMC II Consolidated Complaint solely against Respondent Presbyterian Shadyside. After briefing by the parties, the Administrative Law Judge entered a 120-page Decision and Order which included a remedial order designed to fully remedy the

alleged unfair labor practices directed towards Presbyterian Shadyside alone. The severed single employer allegations in UPMC II have not been tried.

On July 31, 2014, a third Consolidated Complaint in Case 06-CA-119480 was issued ("UPMC III") naming as respondents UPMC and Presbyterian Shadyside, as well as additional respondents not included in this matter. Like the Consolidated Complaints in UPMC I and UPMC II, the UPMC III Consolidated Complaint included nearly identical single employer allegations involving UPMC. Moreover, like the Consolidated Complaints in UPMC I and UPMC II, the UPMC III Consolidated Complaint did not include a single substantive allegation against UPMC or request any relief against UPMC. (UPMC Br. in Support of Mot. to Dismiss Ex. F, UPMC III Consolidated Compl.) The single employer allegations in UPMC III were severed from the merits aspects of the case and consolidated with the single employer allegations of this matter.

In April 2015, a settlement agreement was entered into in UPMC III, which the SEIU did not join, in which UPMC agreed to "guarantee" the performance by the other respondents of the remedial terms of the settlement agreement. (UPMC Br. in Support of Motion to Dismiss Ex. G, Case 06-CA-119480 Settlement Agreement.) More specifically, the settlement agreement approved by the Regional Director of Region 6 stated the following:

> **GUARANTOR** – Without admitting that UPMC and its named subsidiaries are a single employer or single integrated enterprise, in the event that any of the Charged Parties fail to fully comply with any applicable terms of the settlement, UPMC agrees to guarantee compliance with the remedies as set forth in this Agreement at all locations listed in the Posting of Notices paragraph above.

(*Id.*) As part of the settlement of UPMC III, the case was dismissed in its entirety, including the single employer allegations.

Here, on June 4, 2015, UPMC filed a Partial Motion to Dismiss the bifurcated single employer allegations ("Motion"). In support, UPMC offered to "guarantee the performance by Presbyterian Shadyside of any remedial aspects of the Decision and Order which survive the exceptions and appeal process." (UPMC Br. in Support of Mot. to Dismiss, at 5.) The General Counsel and the SEIU opposed UPMC's Motion. All parties availed themselves of the opportunity to brief their positions to the ALJ. At the conclusion of briefing, ALJ Carissimi entered his Supplemental Decision "accept[ing] the proposal of UPMC that it be the guarantor of any remedy." (Supp. D., at 8:30-35.) On the basis of this acceptance, ALJ Carissimi dismissed the single employer allegations in the Complaint. (*Id.*)

ARGUMENT

I. The ALJ's Supplemental Decision Provides an Adequate Remedy (General Counsel Exceptions 2, 3, 5-7, 9-12)

The thrust of the General Counsel's Brief is that ALJ Carissimi improperly dismissed the single employer allegation on the basis of UPMC's guarantee to remedy any unfair labor practices committed by Presbyterian Shadyside, asserting that the guarantee does not effectively remedy Presbyterian Shadyside's alleged unfair labor practices. In so arguing, the General Counsel posits that the ordered guarantee will not provide a "binding and enforceable assurance" that unfair labor practices will not be repeated. The General Counsel's assertion is wholly without merit and should be rejected.

The General Counsel appears to object to UPMC's dismissal as a party solely on the basis that it is a necessary party in case *future* unfair labor practices are committed. (General Counsel Br., at p. 6-7.) The General Counsel merely asserts that UPMC must be included as a party because there may be some yet unidentified actions for which UPMC may need to be held responsible at a later date. In so alleging, the General Counsel ignores that ALJ Carissimi's

dismissal of the single employer allegation does not preclude the General Counsel from making a single employer allegation against UPMC in any subsequent matter.

Moreover, the General Counsel concedes that the ALJ's order is "broad enough to subject Respondent UPMC to contempt sanctions should Respondent UPMC Presbyterian Shadyside violate the November ALJD's cease and desist provisions," but argues it is unclear whether UPMC would be subject to contempt sanctions for its own violations of the cease and desist order. But as the ALJ properly noted, UPMC was not alleged to have committed any unfair labor practices nor were any remedies sought from it in the instant matter. (Supp. D., at 4:24-29.) All remedies are within the exclusive control of Presbyterian Shadyside and, therefore, UPMC cannot violate the cease and desist order as there is nothing from which UPMC must cease and desist. Further, as a guarantor, UPMC is liable for Presbyterian Shadyside's compliance with any remedy ordered and to the extent Presbyterian Shadyside fails to remediate any unfair labor practices on its own, UPMC must take any necessary action to ensure compliance. If UPMC fails to meet its obligations as guarantor, it may be subject to enforcement proceedings for its failure. This provides the General Counsel the same relief to which it would be entitled if UPMC and Presbyterian Shadyside were found to be a single employer.

The hollowness of the General Counsel's argument is underscored by the fact that in UPMC III, the General Counsel tacitly acknowledged the sufficiency of UPMC's guarantee when it accepted in full settlement of the single employer allegations against UPMC the same guarantee ordered by ALJ Carissimi in this matter. Any attempt by the General Counsel to now assert that the guarantee is somehow deficient to resolve the single employer issue is wholly disingenuous. As acknowledged by the settlement of UPMC III, Presbyterian Shadyside is fully

capable of providing any remedies that may be issued in this case and to the extent it fails to do so, UPMC guarantees that it will take whatever actions necessary to ensure compliance.

The General Counsel also suggests that single employer allegations must be litigated because "there is reasonable cause to believe that *both* named respondents were intimately connected and had substantive co-accountability for labor relations." This argument fails as well. The original Consolidated Complaint issued in this matter by Counsel for the General Counsel named only Presbyterian Shadyside. Thus, by the General Counsel's own admission, UPMC was not so "intimately connected" with the actions as to be necessary for remediation. Moreover, even after the amendment of the Consolidated Complaint to include single employer allegations, the General Counsel did not seek remedies from it or allege that it engaged in some misconduct.

As such, the ALJ's determination should be affirmed by the Board.

II. The ALJ Appropriately Dismissed the Single Employer Allegations on Non-Effectuation Grounds (General Counsel Exceptions 1, 4, 8, 12)

In its Exceptions and Brief, the General Counsel argues that the non-effectuation doctrine does not support the ALJ's dismissal of single employer allegations. This position and theory was advanced by the General Counsel below and rejected by the ALJ based on cogent reasoning and relevant Board precedent. Indeed, ALJ Carissimi cited numerous decisions in which the Board has found that it does not effectuate the policies of the Act to find a violation. (Supp. D. 4:10-15.) As noted by ALJ Carissimi, these cases all deal with circumstances in which the Board concluded that it "ought not expend the Board's limited resources on matters which have little or no meaning in effectuating the policies of the Act." *Bellinger Shipyards, Inc.*, 227 NLRB 620 (1976).

Here, ALJ Carissimi highlighted that "the complaint does not allege that UPMC independently committed any of the unfair labor practices" and "there was no evidence presented at the trial that UPMC independently committed any unfair labor practices." (Supp. D. 4:23-26.) In light of UPMC's lack of connection to the substantive allegations in the Complaint, and its offer to guarantee any remedies, ALJ Carissimi ruled consistently with Board precedent that additional litigation or issuance of any further remedial order would not effectuate the Act.

The General Counsel asserts that the decision of whether further litigation effectuates the purposes of the Act is exclusively vested in the General Counsel's office. This is demonstrably wrong.[1] The carefully drafted regulations governing the conduct of, *inter alia*, the Board, administrative law judges, and the General Counsel make clear that an administrative law judge is empowered to dispose of motions to dismiss after the opening of a hearing. 29 C.F.R. § 102.35(a)(8); 29 C.F.R. § 102.24(a). The hearing in this case, including the single employer allegations, opened on February 12, 2014. (Supp. D. 2:5-6.) Thus, the ALJ – not the General Counsel – was empowered to consider and decide upon UPMC's Motion. Moreover, the very cases cited by the ALJ demonstrate that the Board and administrative law judges have authority to dismiss, and have dismissed, complaint allegations on a non-effectuation theory. *See, e.g.*, *Bellinger*, 227 NLRB 620; *Wichita Eagle & Beacon Publ'g. Co.*, 206 NLRB 55 (1973); *Square D Co.*, 204 NLRB 154 (1973); *Kentile, Inc.*, 145 NLRB 135 (1963).

In sum, the ALJ's reliance on a non-effectuation theory is sound, consistent with Board precedent, and should be affirmed by the Board.

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[1] The General Counsel's invocation of the doctrines of mootness and repudiation are similarly misplaced. The ALJ did not rely on either of these doctrines, which deal with discrete legal concepts not relevant to the ALJ's Supplemental Decision. *See, e.g.*, *Passavant Mem'l. Area Hosp.*, 237 NLRB 138 (1978) (explaining the requirements of an effective repudiation which requires specific actions on the part of a respondent).

III. The General Counsel's Consent Order Argument is Misplaced (General Counsel Exceptions 8, 12)

The General Counsel also advances an argument that the ALJ's Supplemental Decision could or should be characterized as a consent order under *Independent Stave Co., Inc.*, 287 NLRB 740, 743 (1987), but that the *Independent Stave* factors are not present. This position is a red herring. Consent orders are premised on the presence of a settlement offer. UPMC's Motion to Dismiss was not presented or reviewed as a settlement offer. Rather, UPMC requested that the ALJ dismiss the single employer allegations because continued litigation of such allegations would not effectuate the purposes of the Act. Accordingly, the concept of consent orders is not relevant to this matter.

CONCLUSION

For these reasons, the ALJ's Supplemental Decision should be adopted by the Board.

Respectfully submitted this 2nd day of October, 2015.

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CERTIFICATE OF SERVICE

It is certified that a copy of UPMC's Answering Brief in Opposition to Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Supplemental Deicsion was electronically filed utilizing the National Labor Relations Board's e-filing system and has been served by email on the following persons on this 2nd day of October, 2015:

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